No. 83-1524

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

A-740

ALAN J. KARCHER, SPEAKER
NEW JERSEY ASSEMBLY, et al.,
Appellants,

v.

GEORGE T. DAGGETT, et al.,
Appellees.

On Appeal From the United States District Court
for the District of New Jersey

APPLICATION TO THE HONORABLE WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT, FOR A STAY PENDING FINAL DISPOSITION OF THE APPEAL

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To the Honorable William J. Brennan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:

Applicants Alan J. Karcher, Speaker of the New Jersey Assembly, Carmen A. Orechio, President of the New Jersey Senate, and Bernard J. Dwyer, James A. Florio, James J. Howard, William J. Hughes, Joseph J. Minish, Robert A. Roe, and Peter W. Rodino, Jr., Democratic members of the Congress from New Jersey, pray that, in the event that the Court does not take final action by Friday, April 13, 1984, on applicants' Jurisdictional Statement filed concurrently with this Application (and attached as Exhibit A), an order be entered directing that the upcoming primary and general elections for Congress in New Jersey be held under Plan A proposed by applicants to the district court.

In Karcher v. Daggett, ____ U.S. ____, 103 S.Ct. 2653 (1983), the Court held the New Jersey statute establishing congressional districts unconstitutional on the sole ground that its population deviation (3,764 people between the largest and smallest districts, or 0.6984%) did not come as close as practicable to absolute population equality.

On remand, applicants presented the district court with a plan ("Plan A," or "the Senate plan") which that court found was "virtually identical" to the existing state statute except that it reduced the population devation from 3,764 people to 67 -- one-fiftieth the size of the prior deviation and, so far as applicants are aware, smaller than any legislatively enacted plan in the nation. The district court rejected this plan and ordered implementation of a radically different plan, proposed by the State's Republican congressional delegation, which if carried into effect will shift almost a third of the State' citizens into new districts and require them to familiarize themselves with new candidates before the upcoming primary and general elections. 1/ The district court preferred its plan because it had the "great advantages" of more compact districts and an infinitesimal improvement in population equality, from 67 people to 25 people out of the 526,072 in an average district. Opinion, J.S. App. 12a.

This is patent error under Upham v. Seamon, 456 U.S. 37 (1982), and White v. Weiser, 412 U.S. 783 (1973). If the district court's order remains in effect, New Jersey congressional elections will go forward under districts that concededly bear little relationship to those established by state law. If the Court cannot take final action in this case by April 16, 1984, an order should be entered that the elections be

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1/ The district court's plan shifts 2,335,308 people (31.7% of the State's population) into new districts. By contrast, the plan proposed by applicants would shift only 9.9% of the state's population into new districts.

held under Plan A submitted by applicants below, which adheres as closely as possible to the districts established by state law and reduces the population deviations to among the best in the nation. In support Appellants state as follows:

I. STATEMENT

On January 19, 1982 New Jersey enacted a reapportionment plan for the election of United States representatives (P.L. 1982, c.1, "the State plan"). The State plan, as required by the 1980 decennial census data, reduced the number of districts from 15 to 14.

The State plan created 14 districts with an average population deviation of 0.135% and a maximum deviation between the smallest and largest district of 3,674 people, or 0.6984%.

A three-judge district court held the enacted plan unconstitutional under Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and this court in Karcher v. Daggett, _____ U.S. _____, 103 S.Ct. 2653 (1983), affirmed. Affirmance was on the sole ground that the deviation in population from one district to another was too great to stand unless the appellants could show that the deviation was required on the basis of some legitimate and consistently applied state policy. The Court held that the appellants had failed to show such justification. The Court pointed out simple ways in which shifts of population from one district to another could significantly reduce the deviation, "within the basic framework" of the State plan. Id., at _____ n.10, 103 S.Ct. at 2663 n.10. The dissenting Justices (Justice White, joined by the Chief Justice, Justice Powell and Justice Rehnquist) would have upheld the statute on the ground that the deviations, given the inaccuracy of the census data, were insignificant.

Justice Stevens, concurring with the majority, and Justice Powell, with the dissent, would have had the Court also consider the shape of districts and the presence

or absence of "political gerrymandering" as a part of the constitutionality of the redistricting. Neither Justice, however, was willing to say that on the record before the Court any unconstitutional gerrymander had taken place. 103 S.Ct. at 2677 (Stevens, J.), 2690 (Powell, J.). With no member of the Court finding a constitutional infirmity in the plan other than population inequality, and the opinion of the Court squarely based on the population issue alone, the case returned to the district court.

On remand, the district court gave the legislature and governor until February 3, 1984, to adopt a constitutionally valid congressional redistricting plan. (Order of December 19, 1983, J.S. App. 32a). A plan was then introduced in the New Jersey legislature (S. 3564) that made the corrections to the State plan suggested by the Supreme Court and additional corrections which reduced the overall deviation even further from 3,746 people (0.69%) to 67 people (0.01%). The lowest district's population was 526,020. The highest was 526,087. The average deviation of all the districts was 11.5 people (0.002%). S. 3564 achieved these equalities without violating any municipal boundaries.

The deviations had thus been brought dramatically beneath those discussed with approval by the Court in footnote 10 of Karcher v. Daggett (0.449% maximum deviation). Both houses of the New Jersey legislature adopted the plan within the time limit set by the district court. The governor, a Republican, vetoed the plan.

As a result of the veto, the New Jersey legislature did not meet the February 3, 1984 date set by the district court for legislative enactment of a plan and the court hastily held hearings on February 7 to chose among plans presented to it. At the hearing applicants presented three plans. Plan A or the Senate plan was S. 3564, approved by the New Jersey legislature but vetoed by the governor. Plan B was a minor variation on Plan A, which by breaking a single municipal boundary, and shifting one small block in Kearny from the 11th to the 10th district, reduced the overall

deviation from 67 to 42 people. The New Jersey Senate intervenor attempted to introduce a third variation (Plan C) which, by moving several municipalities in addition to the Kearny block, was able to reduce the overall deviation to 17 people. The district court refused to admit the plan as the adjustment had not been made prior to February 3. The court stated that it was not interested in further "fine tuning" to reduce the deviations in any of the submitted plans. Hearing Tr. 58-60 (quotation at 60). 2/

The Republican congressional delegation presented a plan not based at all on the enacted plan. Unlike all the plans discussed at the previous district court hearing, all plans that have passed the New Jersey legislature since 1970, and all the plans endorsed by the Governor, this plan -- the Forsythe plan -- broke municipal boundaries. By doing so it obtained an overall deviation of 25 people (0.004%). The average deviation of all the districts was 5.9 people, or 0.001%. Under the Forsythe plan 31.7% of the state's citizens (2,335,308 people) would be placed in districts different from those used in the last election. 3/

The district court, in reviewing the plans before it, stated that no deference needed to be given to the state-enacted plan because "[w]e owe no deference to an unconstitutional state statute." Opinion, J.S. App. 9a. The district

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2/ The plan as presented to the district court on February 7th had a deviation of 11 people. However, it was later discovered that it was not entirely contiguous because one municipality did not quite connect with the remainder of its district. On February 15, 1984, counsel for the State Senate intervenors wrote the Court, correcting the discontinuity in the plan. The correction changed the absolute deviation to 17 people.

3/ In addition to the plans discussed above, four other plans were before the district court, two submitted by the Governor and two by an intervening group named Taxpayers Political Action Committee. Those plans are described in the district court's opinion, J.S. App. 6a-7a (Taxpayers Committee), 10a-11a (Governor's plan). The Taxpayers Committee plans had deviations larger than those in the state statute. The Governor's plans had deviations of 67 and 60.

court also stated "finally, the opinion of the court in Karcher v. Daggett, while declining to rely as a constitutional violation on the obviously partisan purposes behind the [State statute] recognizes that '[a] federal principle of population equality does not prevent any State from taking steps to inhibit gerrymandering so long as a good faith effort is made to achieve population equality as well.'" Opinion, J.S. App. 6a. The court went on to say that since the Supreme Court had considered "what interests may be taken into account by state legislatures in justifying deviations from the ideal of district population equality" that it, as a court, could take those same factors into account in evaluating the several plans. Id. The court, incorrectly assuming that it had as much discretion as the Legislature, then chose the Forsythe plan, concluding that it achieved smaller population deviations and created of more compact districts, and that its only disadvantage was in splitting two North Jersey municipalities. The court held "that this disadvantage is outweighed by the advantages of compactness and population near uniformity". Opinion, J.S. App. 12a. The court rejected S. 3564 (Plan A) and the other variations on the state statute, stating that any deference to the plan enacted by legislature of New Jersey would result in a plan containing "an obvious absence of compactness" and (without explaining its standards or referring to any evidence in support of its conclusion) "an intentional gerrymander in favor of certain democratic representatives". Opinion, J.S. App. 8a.

Applicants sought a stay from the district court on March 7, 1984. To date, the district court has not acted on this application.

II. REASONS FOR ISSUING AN ORDER

An order is necessary because the district court has arrogated to itself the functions of the New Jersey legislature. Its action flouts White v. Weiser and Upham v. Seamon by decreeing that the future elections shall be in accord with a plan chosen precisely because it does not conform to the statute enacted by the State of New Jersey.

New Jersey candidates for the United States House of Representatives are required to file petitions, containing 200 signatures, by April 26, 1984. If the full Court cannot act on our Jurisdictional Statement and resolve this question by April 13, we ask for an order so that the next election will not be held under a redistricting plan bearing no relation to the plan enacted by the state of New Jersey or the corrected plan adopted by both houses of the New Jersey legislature, and severely changing the districts used in the last election. We ask that the order direct the next congressional election to take place under Plan A, which corrected the population deviations of the enacted plan bringing them down to 67 people, one of the lowest population deviations in the nation, without violating a single municipal boundary.

A. The district court's rejection of the Senate plan and adoption of a plan because it does not resemble the plan adopted by the New Jersey Legislature is an unlawful intrusion of the judiciary into the legislative function, which raises substantial questions on appeal.

The Separation of Powers requires that the judiciary involve itself in reapportionment issues only to the extent necessary to assure a constitutional reapportionment. A court should not substitute its judgment, esthetics, or politics for that of a state legislature except to the extent absolutely required to assure obedience to the Constitution. The Court has never strayed from that principle. The Court has recognized that the powers of a district court to modify an unconstitutional state plan "are limited to those necessary to cure any constitutional or statutory defect." Upham v. Seamon, 456 U.S. 37, 43 (1982). Hence the district court's task was simply to cure the constitutional defects found in P.L. 1982, c.1, not to reshape districts or make policy judgments about the virtues of compact districts or divisions of municipal boundaries. As the Court has previously noted:

> From the beginning, we have recognized that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." Reynolds v. Sims, 377 U.S. 533, 586 (1964).... In fashioning a reapportionment plan or choosing among plans, a district court should not preempt the legislative task nor "intrude upon state policy any more than necessary." Whitcomb v. Chavis, supra, at 160.

White v. Weiser, 412 U.S. 783, 795 (1973) (some citations omitted).

These principles were clarified -- and the passage above quoted in full -- as recently as 1982 in Upham v. Seamon, supra. In that case the District Court found that the lines drawn for two districts in the Texas legislature's plan were unconstitutional. It proceeded, however, to order the use of a plan that redrew the lines not only of those districts but of other districts as well.

The Supreme Court reversed -- unanimously and without hearing oral argument. The Court read White v. Weiser as holding that a district court errs "when, in choosing between two possible court-ordered plans, it fail[s] to choose that plan which most closely approximate[s] the state-proposed plan." 456 U.S., at 42.

Thus, the fact that the Court declares a state reapportionment statute unconstitutional does not give a district court on remand a license to ignore the statute and fashion a new reapportionment to its own tastes and preferences. The unconstitutional features are to be corrected. The state statute is otherwise to be preserved.

The district court -- by its own admission -- has not done this. Referring to the last enacted statute it held "[w]e owe no deference to an unconstitutional state statute." (Opinion, J.S. App. 9a). The district court appears to treat Karcher v. Daggett as having held the state statute unconstitutional on gerrymander grounds, (see

Opinion, J.S. App. 9a,) which of course this Court did not do. Ignoring the state statute, the district court approved a plan not based on any plan enacted by the State or approved either by the Governor or either House of the Legislature. The court simply substitutes its own judgment for that of the legislature. For instance, the court says (Opinion, J.S. App. 12a):

> The two great advantages of the Forsythe plan, over any of the others, are the achievement of smaller population deviations, and the creation of more compact districts. The only disadvantage which the plan presents is the splitting of two North Jersey municipalities in order to achieve those advantages. We hold that this disadvantage is outweighed by the advantages of compactness and population near uniformity. [Emphasis added.]

The district court thus substituted its view on dividing municipalities for that of the State. The State's own plan divided no municipalities. Neither did the plans proposed by the Governor. Neither did the Senate plan (Plan A) enacted by both houses. Indeed, in discussing that plan the Senate Report stated that

> ..no consideration be given to dividing any municipality in order to reduce further the plan's infinitesimal deviations (assuming that is possible), because to do so would be worse than the imperceptible "inequality".... To divide municipal lines anywhere in the State would cause confusion and administrative nightmares with regard to running congressional elections.

Senate Report at 2. As Senator Lynch noted in his introduction of the bill, "The municipality is the basic unit through which the election process is held in New Jersey is held." Plan A achieves the lowest population deviation consistent with preservation of municipal lines.

Since Plan A, the Senate plan, more than corrected the population inequalities noted by this Court and did so without splitting municipalities, the district court under White and Upham was not free to adopt a radically different plan.

B. The forthcoming election of representatives should not be held under the Forsythe plan.

Contestants for the House of Representatives from New Jersey must qualify by April 26, 1984 by presenting a petition containing 200 voters' signatures from the district in which they will run. The primary elections are to be held June 6.

In the last election the districts used were those of the enacted plan. The elected representatives since that time have represented and served the needs of the people in those districts. The status quo is thus the enacted plan. The Senate plan corrects the deficiencies in that plan with the least dislocation of districts and with no division of municipal lines. An election under that plan therefore poses little administrative problem or dislocation of representation.

The Forsythe plan, adopted by the district court is radically different. To begin with, it divides municipalities, threatening "administrative nightmares" in the printing of ballots and operation of polling places. Second, it requires a massive dislocation of present districts. 31.7% of the population of the State -- 2,335,308 people -- would have to be moved from one district to another.

If we have demonstrated a substantial probability that the district court improperly rejected Plan A, which was closest to the enacted plan and fully corrected that plan's sole constitutional defect, then the next election should not proceed under a totally different plan. This would create massive confusion, compounded two years later in changing back to a plan based on the enacted plan. On the other hand, an election under the enacted plan, as corrected to end population inequality -- Plan A -- creates no such confusion. With transfers of less than 10% of the people from one district to another, with no split districts, elections can be held under conditions of numerical equality required by this Court. If the Court does not rule in our favor, then

the major change ordered by the district court could be made in an orderly way, rather than in haste.

Such an order is well within the authority of a Justice of this Court. Under Rule 44 a stay or injunction "may be granted by any Justice in a case where it might be granted by the Court." In McCarthy v. Briscoe, 429 U.S. 1317 (1976) (Powell, J.), the district court had declared Texas' refusal to put McCarthy on the ballot unconstitutional, but denied injunctive relief on the ground of laches. The court of appeals refused emergency relief. Justice Powell ordered the defendant to place McCarthy's name on the ballot. (The order notes that he polled the rest of the Court and that a majority would have done the same thing.) Similarly in Williams v. Rhodes, 21 L.Ed.2d 69 (1968) (Stewart, J.), Justice Stewart granted a temporary injunction, ordered names placed on ballots, and set (by consultation with the Court) an expedited schedule for briefing and argument.

III. CONCLUSION

If the full Court does not take final action to resolve this case by April 16, 1984, an order should be entered directing that the upcoming primary and congressional elections in New Jersey be held under Plan A presented to the district court. If the absolute minimum of deviation without regard to municipal boundaries, the order should direct the implementation of Plan B or Plan C, both of which are similar to Plan A but lower the maximum deviation to 42 and 17 people, respectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 1984, I caused a copy of the foregoing Application for an Order to be mailed by express mail, postage prepaid to each of the other parties in this case at the addresses below. I further certify that all parties required to be served have been served.

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